Supreme Court, U.S.
FILED
APR 12 2010
OFFICE OF THE CLERK

No. 09-901

IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
600 New Hampshire Avenue, NW
Washington, D.C. 20037
(202) 556-2000

HENK BRANDS
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7300

Counsel for Petitioner

(Additional Counsel Listed on Inside Cover)

HOWARD J. SYMONS
TARA M. CORVO
MINTZ, LEVIN, COHN,
FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 434-7300

TABLE OF CONTENTS

	Page:
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. RESPONDENTS' PROCEDURAL OBJECTIONS LACK MERIT	2
II. RESPONDENTS' SUBSTANTIVE DEFENSES LACK MERIT	6
CONCLUSION	13
APPENDICES	
A. Cablevision's Opposition to WRNN's FCC Petition	1a
B. Cablevision's Opening Brief in the Second Circuit	21a
C. Cablevision's Reply Brief in the Second Circuit	33a

TABLE OF AUTHORITIES

Page(s):

CASES

A-R Cable Servs. — Me., Inc. v. FCC, Civ. No. 95-134, 1995 WL 283861 (D. Me. May 10, 1995) 4

Cablevision Systems Corp. v. FCC, No. 07-1425, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010) 7, 8

Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) 5

Citizens United v. FEC, 130 S. Ct. 876 (2010) 3, 5

City of Chicago v. Morales, 527 U.S. 41 (1999) 2

Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009) 7

Edenfield v. Fane, 507 U.S. 761 (1993) . . . 10

Ex parte Poresky, 290 U.S. 30 (1933) (*per curiam*) 4

FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984) 4

Hill v. Colorado, 530 U.S. 703 (2000) 11

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 5

Pacyna v. Marsh, 474 U.S. 1078 (1986). . . 5

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) 7

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) 6

Renne v. Geary, 501 U.S. 312 (1991) 3

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 1, 5-7, 10

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) 1, 6-7, 10

United States v. Grace, 461 U.S. 171 (1983) 10

Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954) 4

STATUTES AND RULES

28 U.S.C. § 1631 4

28 U.S.C. § 2284 4

28 U.S.C. § 2342(1) 4

47 U.S.C. § 534(h)(1)(C) 9

47 U.S.C. § 555(c)(1) 4

ADMINISTRATIVE DECISIONS

Cable Horizontal and Vertical Ownership Limits, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) 3

INTRODUCTION

In opposing review, the government seeks to continue a statutory intrusion on First Amendment rights long after the facts justifying it have evaporated. The government does not seriously dispute that dramatic industry changes have wiped out the linchpin of this Court's *Turner* decisions. The "bottleneck" that this Court previously concluded cable companies occupied has now disappeared in most locations (and everywhere Cablevision serves). Consumers can now choose among cable and two different satellite providers and often a local telephone company as well. "[T]he entry of direct broadcast satellite (DBS) providers (and more recently the local telephone companies)," the government agrees, has subjected cable companies "to greater competition." Br. 18. Indeed, as long as four years ago, "approximately 29.2% of all United States video subscribers" received their video service from cable's satellite competitors. *Id.* That fundamental change guts *Turner's* rationale for upholding the compelled speech contemplated by the must-carry regime.

The government nonetheless seeks to avoid review by raising a series of procedural objections. But those objections are meritless. Moreover, the FCC's specific application of must-carry in this case — to require Cablevision to displace quality channels of its choosing in favor of a home-shopping station with no over-the-air viewers — is incapable of coherent defense. And that application illustrates precisely why this Court must again consider the constitutionality of must-carry, this time in the favored as-applied context.

I. RESPONDENTS' PROCEDURAL OBJECTIONS LACK MERIT.

The government begins by claiming (at 15-16) that Cablevision's principal constitutional challenge is not properly before this Court — supposedly because it constitutes a "facial challenge." According to the government, Cablevision advanced only an "as applied" challenge below and is therefore not allowed to make "facial" arguments here. That argument is utterly confused.

Respondent WRNN initiated this case by asking the FCC to compel Cablevision to carry WRNN's signal. Cablevision defended itself by arguing that granting WRNN's request would infringe Cablevision's First Amendment rights. In support, Cablevision advanced some arguments that are relatively specific to the circumstances of Cablevision and WRNN (*e.g.*, that compelled carriage of WRNN is unlawful when WRNN has no over-the-air viewers), and other arguments based on facts that affect many other stations and systems as well (*e.g.*, that compelled carriage of WRNN is unlawful when the systems at issue are subject to competition from two satellite providers). But the sole relief Cablevision sought was that it not be required to carry WRNN.

The government now urges (at 15-16) that Cablevision's broader arguments must be deemed "facial challenges" because they imply that it is impermissible to impose must-carry obligations on *any* U.S. cable system. But a facial challenge asks a court to enjoin a measure's enforcement across-the-board not only as applied to the plaintiff but also as applied to absent third parties. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality); *id.*

at 80 n.3 (Scalia, J., dissenting); *Renne v. Geary*, 501 U.S. 312, 323-24 (1991); *id.* at 328 (White, J., dissenting). By contrast, Cablevision seeks only to stave off application of must-carry obligations *to it* in this particular case; Cablevision does not seek relief with respect to the statute's application to other cable systems.[1]

The government cites no authority for the strange notion that, where a defendant resists a statute's *actual application* to it, that "as applied" challenge somehow transmogrifies into a "facial" challenge when the precedential consequences of success become sufficiently far-reaching. The government likewise cites no precedent for the notion that an as-applied challenger's argument with broad precedential implications is somehow forfeited if it is not accompanied by magic "facial challenge" words. And any such notion is absurd. As the Chief Justice recently explained, an as-applied litigant naturally is entitled to make arguments that, if accepted, "would mean that any other [person] raising the same challenge would also win." *Citizens United v. FEC*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring).

---

[1] Besides, because Cablevision's arguments would not necessarily invalidate the statute as applied to *all* cable systems, this is not a facial challenge even under the government's (mistaken) theory. For example, the FCC has posited that there are pockets where satellite cannot compete. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 70 n.236 (2008) ("In northern latitudes, as well as highly urbanized or forested locations, it may not be possible to receive a DBS signal . . . ."), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

The government also urges (at 15) that Cablevision's broader arguments are barred by 47 U.S.C. § 555(c)(1), which provides that, "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of [the must-carry statute] shall be heard by a district court of three judges convened pursuant to" 28 U.S.C. § 2284.

That argument, which was not raised below, is entirely baseless. It is well settled that three-judge-court statutes do not create district-court jurisdiction — they signify only that, if district-court jurisdiction otherwise exists, the case is to be "heard" by not one but three judges. *See, e.g., Ex parte Poresky*, 290 U.S. 30, 31 (1933) (*per curiam*); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737 (9th Cir. 1954). Cablevision here makes its constitutional arguments in the course of an appeal from an order of the FCC. District courts lack jurisdiction over such an appeal: "exclusive jurisdiction" lies in the courts of appeals. 28 U.S.C. § 2342(1); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Section 555(c)(1) has accordingly been interpreted to allow litigants like Cablevision to attack must-carry's constitutionality in a court of appeals.[2] In any event, even under the government's (mistaken) analysis, Section 555(c)(1) bars only "facial" challenges in a court of appeals. *Compare* Br. at 15 *with id.* at 8-9. As explained above, this is an as-applied challenge.[3]

---

[2] *See A-R Cable Servs. — Me., Inc. v. FCC*, Civ. No. 95-134, 1995 WL 283861, at *5 (D. Me. May 10, 1995).

[3] If the Court nonetheless concludes that Section 555(c) divested the court of appeals of jurisdiction, it should grant, vacate, and remand so the court of appeals can consider whether it should transfer the case to district court pursuant to 28

Finally, the government relies on the state of the record below. It claims, for example, that Cablevision did not warn the FCC that its order would be subjected to "strict scrutiny," Br. 13; *see also id.* at 11 (same about argument that WRNN does not need must-carry). But the government confuses claims with arguments. As we explained below, this Court's "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." C.A. Br. 16 n.21 (quoting *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)) (reproduced at Reply App. 34a). Presumably for that reason, the Second Circuit saw no waiver, thereby putting the matter to rest. *See* Pet. App. 22a-23a; *see also Lebron*, 513 U.S. at 379 (issue properly before this Court if it was "passed upon" by court below).

The government also claims (at 16-18) that the administrative record is too thin to permit review. This Court recently heard an as-applied challenge over precisely the same objection. *Compare Citizens United*, 130 S. Ct. at 894 *with id.* at 933 (Stevens, J., dissenting in part). The grounds for rejecting the objection are even stronger here. Cablevision's filing before the FCC made a comprehensive constitutional showing. *See* Reply App. 1a-20a. To be sure, the FCC and WRNN then largely ignored the constitutional arguments. But the FCC cannot ignore its burden of justifying an intrusion on speech rights,[4]

U.S.C. § 1631. *See, e.g., Pacyna v. Marsh*, 474 U.S. 1078 (1986).

[4] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*"); *Century Communications Corp. v. FCC*,

and then, having done so, avoid review by complaining that the record is insufficient. Besides, quite apart from Cablevision's showing, the relevant facts are uncontested matters of public record. For example, the FCC conceded in 2006 — and again concedes here (Br. 18) — that "almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers," and can in many areas also choose among "emerging (*e.g.*, use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies." Reply App. 5a.

II. RESPONDENTS' SUBSTANTIVE DEFENSES LACK MERIT.

Respondents' merits arguments are largely unresponsive. As the petition demonstrated (at 18-19), *Turner*'s cornerstone was that, at the time, cable systems — as the only act in town — constituted a sufficient "bottleneck" to justify an intrusion on their editorial discretion. The core request here is that this Court decide whether must-carry obligations remain consistent with the Constitution now that consumers have a choice among video providers. The government does not dispute the factual predicate: it agrees (at 18) that "the cable industry is now subject to greater competition than at the time of this Court's decisions in *Turner I* and *Turner II*." That underscores the need for immediate review.

1. Nonetheless, the government urges (at 18-19), that "cable still controls two thirds of the market

---

835 F.2d 292, 300 (D.C. Cir. 1987); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985).

nationally" and that the "market penetration of [competitors]" may be "even lower" in certain regions. That misses the point. A high market share may have consequences for regulatory analysis.[5] But the First Amendment issue here turns on the existence of a bottleneck that supposedly would have allowed cable operators with anticompetitive motives costlessly to refuse to carry desirable over-the-air programming. Now that consumers can switch to competing sources, that "bottleneck" is gone. Perhaps the government would prefer to postpone review until cable's market share dips even further. But that lack of urgency is misplaced where "our most cherished liberties" are at stake. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973).

The government also suggests (at 19) that the emergence of competition is irrelevant because must-carry remains necessary to ensure that over-the-air viewers continue to have over-the-air choices. But that argument goes well beyond *Turner*'s rationale, which crucially depended on the absence of competition. Pet. 6-7, 8-9, 17-18. The government's alternate rationale is not only untested but also plainly wrong. Simply put, "when a

---

[5] *But see Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009). The government relies on *Cablevision Systems Corp. v. FCC*, No. 07-1425, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010), but that divided decision underscores the need for review here. The majority there noted that "the MVPD market has transformed substantially since the Cable Act was enacted in 1992." *Id.* at *7. A dissenting judge would have held that, in light of the "radically changed and highly competitive marketplace," the challenged cable regulation violated the First Amendment. *See id.* at *17 (Kavanaugh, J., dissenting).

market is competitive, direct interference with First Amendment free speech rights in the name of competition is typically unnecessary and constitutionally inappropriate." *Cablevision Sys. Corp.*, 2010 WL 841203, at *20 (Kavanaugh, J., dissenting). At a minimum, whether the government's alternate rationale can withstand scrutiny is a question worthy of this Court's attention.

Finally, WRNN (but not the government) argues that our core argument is unworthy of review absent a direct circuit conflict. WRNN Br. 16. But the petition explains (at 23) why such a conflict is unlikely to develop. And our core argument raises precisely the kind of important constitutional issue that this Court addresses even absent a conflict.

2. Respondents' attempted defense of the particular application of must-carry here cannot be reconciled with the First Amendment. As the petition explained (at 25), the purpose of must-carry was to ensure that over-the-air broadcast stations would remain available for over-the-air viewers. That rationale cannot justify a must-carry preference for a station that, like WRNN, has *no over-the-air viewers at all*.

WRNN previously conceded that it has no over-the-air viewers, Pet. 25-26, and makes no effort to retract that concession here. The government, by contrast, obfuscates by insisting that WRNN "has an audience in [Long Island] communities." Br. 10. But WRNN is carried by *satellite* operators, WRNN Br. 7-8, and the source on which the government relies (Pet. App. 45a) states that WRNN has *viewers*, not that it has *over-the-air* viewers. On that topic, WRNN's own concession is dispositive. That WRNN

is carried by Cablevision's competitors, moreover, underscores the absence of any justification for forcing Cablevision to displace its chosen programming. Consumers who want WRNN can switch providers. Such competitive pressures may cause cable operators to carry WRNN. Where competition gives viewers choices, the First Amendment does not allow the government to override editorial discretion.

Applying must-carry here is particularly absurd given that WRNN is seeking to extend its coverage far beyond its traditional over-the-air service area. Pet. 25-26. Must-carry thus has been transformed from a device to protect broadcasters' ability to reach existing viewers into a tool for cracking open entirely new markets. The government responds (at 8, 10) that WRNN is simply seeking the default carriage to which the must-carry statute entitles it. But the First Amendment does not allow intrusion on speech based on default rules that do not serve the statute's purpose. For that reason, the statute contains a market-modification safety valve intended to *prevent* stations from using must-carry to expand into new markets. 47 U.S.C. § 534(h)(1)(C).

Perhaps recognizing as much, the government urges (at 9) that facts relating to the particular broadcast station at issue are irrelevant to the constitutionality of applying must-carry. Under intermediate scrutiny, the government urges, any measure must be evaluated in terms of its "general effect," even in as-applied challenges. But that argument wrongly collapses the distinction between as-applied and facial challenges. This Court routinely sustains as-applied arguments just like the one ad-

vanced here.[6] The government commits the same error when attempting to address (at 10-12) the problem that financially secure WRNN does not need carriage on Long Island to remain on the air. Perhaps the Court did not require an individualized showing of need in *Turner*. But *Turner* involved a facial challenge — unlike the as-applied challenge here.

Besides, WRNN's lack of an over-the-air audience points to a broader problem. Since the 1990s, the number of over-the-air households has plummeted. Pet. 20. The FCC concedes that, four years ago, only 14% of households still relied on over-the-air broadcasting. *See* Br. 19-20. The government's interest in preserving over-the-air broadcasting dwindles with the over-the-air audience. The government contends that dwindling over-the-air viewership "makes carriage on cable systems even more critical to . . . ensur[e] that a 'multiplicity of broadcasters' are financially able to provide an alternative source of programming to the American public." But it cannot be that must-carry remains constitutionally unimpeachable so long as even a single over-the-air viewer remains. The dramatic decline in over-the-air viewership underscores the need for this Court to determine whether this intrusion on

---

[6] *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("Even under . . . intermediate standard of review, however, Florida's blanket ban on direct, in-person, uninvited solicitation by CPA's cannot be sustained *as applied to Fane's proposed speech*.") (emphasis added); *United States v. Grace*, 461 U.S. 171, 183 (1983) (statute prohibiting carrying of banners was unconstitutional "as applied to . . . sidewalks" surrounding Supreme Court building).

First Amendment rights may continue.

The government argues (at 20), however, that, as must-carry has become less needed, it has also grown less burdensome — in that cable operators have found ways of transmitting more video signals through the same wires. But, in assessing a burden on editorial discretion, the amount of cable spectrum occupied by a must-carry station is no more dispositive than the column space allocated to a required newspaper article. Besides, the existence of countervailing developments (like bandwidth-intensive high-definition programming) make this case particularly worthy of the Court's attention.

Finally, the FCC disputes neither that it weighed WRNN's speech content when considering whether to impose must-carry here nor that content-discrimination would render the FCC's order subject to strict scrutiny. Instead, the government argues that the FCC "did not consider WRNN's programming to determine whether it agreed or disagreed with the ideas or views expressed." Br. 14 (quotation marks omitted). But "[r]egulation of the *subject matter* of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (emphasis added).

In closing, a word about WRNN's submission. Despite its unsubstantiated accusations,[7] WRNN

---

[7] For example, WRNN urges (at 21, 32) that Cablevision declined to carry WRNN in an effort to protect its own News12 and Newsday from competition. Suffice it to say that WRNN flatters itself when it suggests that its home-shopping fare competes with News12's news programming and that Cablevi-

confirms (at 7-8) that it moved its transmitter and added Long Island-targeted programming in an effort to gain must-carry rights. This is what must-carry has come to: a home-shopping station's tool to manufacture cable carriage in far-away markets at C-SPAN's expense. Unless this Court intervenes, WRNN's effort will bear fruit in just a matter of weeks. The Court should prevent that First Amendment monstrosity by agreeing to consider the constitutionality of must-carry in this case.

---

sion did not even acquire Newsday until long after the issuance of the order under review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
600 New Hampshire
Avenue, NW
Washington, D.C. 20037
(202) 556-2000

HOWARD J. SYMONS
TARA M. CORVO
MINTZ, LEVIN, COHN,
FERRIS, GLOVSKY AND
POPEO, P.C.
701 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 434-7300

Counsel for Petitioner

HENK BRANDS
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7300

April 13, 2010

APPENDICES

APPENDIX A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WRNN License Company, LLC

For Modification of the Television Market For
WRNN-DT, Kingston, New York

Facility Id. No. 74156

CSR 6956-A

OPPOSITION OF
CABLEVISION SYSTEMS CORPORATION

* * *

February 13, 2006

* * *

III. EXTENDING WRNN'S CARRIAGE RIGHTS WOULD IMPOSE SERIOUS BURDENS ON CABLE SPEECH WITHOUT COUNTERVAILING PUBLIC INTEREST BENEFITS AND WOULD NOT MATERIALLY ADVANCE ANY GOVERNMENT INTEREST

The Supreme Court recognized in *Turner* that "there can be no disagreement" about the "initial premise" that "cable operators engage in and transmit speech, and they are entitled to the protections

of the speech and press provisions of the First Amendment."[198] The Court further concluded that "the must-carry rules regulate cable speech."[199] As such, in order to survive First Amendment scrutiny, must-carry burdens must "serve important government interests 'in a direct and effective way,'"[200] and must be narrowly tailored not to "burden substantially more speech than is necessary to further"[201] the government interests served by must-carry.

Must-carry was intended "to serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming."[202] However, in ruling to uphold must-carry, the Court determined that these interests were subsumed in the "overriding congressional purpose" of "'protecting non cable households from loss of regular television broadcasting service due to competition from cable systems.'"[203] The Supreme Court

---

[198] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*").

[199] *Id.* at 637.

[200] *Turner II*, 520 U.S. at 213 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

[201] *Turner I*, 512 U.S. at 662.

[202] *Turner II*, 520 U.S. at 189 (internal citations omitted).

[203] *Turner I*, 512 U.S. at 647 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). This purpose built upon the long-standing "basic tenet of national communications policy that 'the widest possible dissemination of informa-

agreed that this objective – protecting free, over-the-air television from economic injury resulting from cable operators' refusal to carry broadcast signals – qualified as "important" for purposes of intermediate scrutiny. As the Commission explained in its brief to the Second Circuit in 1998:

> Must carry was implemented to help restore broadcast stations in a cable-dominated world to the position they were in before cable became the "dominant nationwide video medium." 1992 Cable Act § 2(a)(3). Restoration of that status serves two related purposes: first, viewers with cable will continue to be able to watch broadcast stations on cable even after disconnecting their television antennas; second, cable carriage will preserve the stations' revenue base, allowing over-the-air viewers who cannot afford cable to continue to be able to receive broadcast stations. In other words, must carry was intended to "*preserve* the *existing structure* of the Nation's broadcast television medium." *Turner I*, 512 U.S. at 652 (emphasis added). *See also id.* at 623 ("Congress wanted "to *preserve* access to free television programming for the 40 percent of Americans without cable").[204]

As a content-neutral government regulation of speech, must-carry could be sustained only if it furthered these interests in a manner that would be

---

tion from diverse and antagonistic sources is essential to the welfare of the public.'" *Turner II*, 520 U.S. at 192.

[204] Brief for Respondents at 27, *WLNY-TV v. FCC*, 163 F.3d 137 (2d Cir. Jan. 22, 1998) (No. 97-4243) (footnotes omitted, emphasis in original).

achieved less effectively absent the statute, and its resulting burdens on speech were narrowly tailored so as not to burden substantially more speech than was necessary to further that interest.[205] The *Turner II* court narrowly found that must-carry satisfied that test, after analyzing the market for distribution of programming at the time of the decision.

Since 1992, however, the market for distribution of programming has fundamentally changed. In *Turner II*, the specific facts relied upon by the Supreme Court in finding a rational justification for must carry were that in 1992: (1) 40% of the public relied solely upon over-the-air broadcasts;[206] (2) cable operators possessed a local monopoly over cable households, and only one percent of communities were served by more than one cable system;[207] (3) cable systems had little incentive to carry, and a significant incentive to drop, broadcast stations;[208] (4) predictive economic evidence suggested that denying carriage to broadcast stations would be rational for cable, since a cable company could theoretically drop a broadcast station without losing a substantial number of subscribers;[209] and (5) the burden of must-carry was "modest" since most cable operators had excess capacity to dedicate to carriage

---

[205] *Turner I*, 512 U.S. at 661-662.

[206] *Turner II*, 520 U.S. at 190.

[207] *Id.* at 197.

[208] *Id.* at 201.

[209] *Id.* at 202.

of additional broadcast channels.[210] None of those facts is true today:

- 14% of households today rely on over-the-air broadcasting, far below the 40% that did so in 1992.[211]
- Contrary to the "local monopoly" for cable found in 1992, the FCC found in 2005 that "[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers may also choose between other traditional (*e.g.*, broadcasting, cable, DBS) and emerging (*e.g.*, use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies as well."[212]
- Congress's belief in 1992 that cable operators have no incentive to carry, and every incentive to drop, broadcast stations has been proven false, with the FCC recognizing in 2004 that "carriage of local television broadcast station signals is critical to MVPD offerings" and that broadcasters possess market power in their local markets that can be wielded to disadvantage cable.[213]

---

[210] *Id.* at 214.

[211] *See* News Release, "*FCC Issues 12th Annual Report to Congress on Video Competition*" (rel. Feb. 10, 2006).

[212] *Id.*

[213] *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, 565, ¶¶ 201-202 (2004).

- Congress's economic prediction that cable operators could drop broadcast stations with little fear of losing subscribers has been proven false, and since 1992 both Congress and the FCC have done an about-face to recognize that carriage of local broadcast signals is essential if an MVPD is to attract and retain subscribers.[214]
- The Court's finding in *Turner II* that must-carry would impose only a modest burden due to excess channel capacity on cable systems cannot be supported in 2006, when a cable system must allocate its scarce capacity among numerous broadcast stations, over 500 nationally available programming networks,[215] nearly 100 regional networks, and other, new uses for the cable plant such as satisfying consumers' ever-increasing demand for Internet bandwidth over its cable plant and meeting demand for new Voice over Internet Protocol ("VoIP") service.

The market in which consumers view television in 2006 bears almost no resemblance to the market in 1992. Most significantly, the *Turner* rationale depended upon the Court's determination that cable was not subject to effective competition. As noted above, the Commission has acknowledged that this circumstance is no longer true. Consequently, cable television no longer poses a threat to free, over-the-

---

[214] *Id.* (discussing Congress's grant of local rebroadcast rights to DBS carriers in SHVIA, and the actual market effects that followed, including greater subscriber gains in areas where DBS providers offer local broadcast stations).

[215] *See* News Release, "*FCC Issues 12th Annual Report to Congress on Video Competition*" (rel. Feb. 10, 2006) at 4.

air broadcast television. Moreover, the broadcasters whom Congress found required protection from cable's local market power in 1992 now own the largest share of cable programming networks and use their own local market power — derived from the "must-have" status of their local broadcast signals — to impose monopoly rents on cable systems and indirectly on cable customers and to leverage that market power to the benefit of their own programming networks.[216] It appears that either the 1992 Cable Act worked too well, or that broadcasting is simply an extraordinarily lucrative business regardless of its regulatory environment. In either case, the justifications for must-carry accepted by the Supreme Court in *Turner II* no longer exist.

A. Mandatory Carriage of Home Shopping/Infomercial Stations With Negligible Over-The-Air Viewership is Unconstitutional.

Even if must-carry would be found constitutional today despite the significant developments described above, required must-carry of home shopping/infomercial stations with negligible over-the-air viewership clearly cannot survive First Amendment scrutiny under *Turner*. When it enacted the must-carry law, Congress was concerned that forcing cable operators to devote channel space to

---

[216] For example, the "big four" broadcasters (ABC, CBS, NBC, and Fox) today own ten of the fifteen top-rated non-broadcast networks, compared to only three of the fifteen ten years ago. *Id.* at 2902, Table C-7; KAGAN, ECONOMICS OF BASIC CABLE NETWORKS 60 (2005); KAGAN, ECONOMICS OF BASIC CABLE NETWORKS 39-40 (1996).

broadcasters whose programming was mainly home shopping and infomercials was an undue burden and would not advance the purposes of must-carry. Indeed, Congress could not reach agreement over whether such broadcasters should even be entitled to hold licenses *at all*, given the dubious nature of the claim that such broadcasters serve the public interest. It therefore directed the Commission to determine "whether home shopping broadcast stations are serving the public interest, convenience, and necessity."[217] The Act specified three factors to be considered by the Commission in drawing its conclusion: (1) the viewing of home shopping stations by the public; (2) the level of competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to non-broadcast services offering similar programming.[218]

The Commission considered these factors and determined that home shopping stations serve the public interest and therefore, are entitled to must-carry. Interestingly, one rationale for this decision was a concern among Commissioners that denying must-carry for home shopping stations would suggest that must-carry was content-based and therefore subject to strict scrutiny in the then-ongoing

---

[217] *See Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Station Issues*, MM Docket No. 93-8, Report and Order, 8 FCC Rcd. 5321, 5321, ¶ 2 (1993) ("*Home Shopping Order*").

[218] 47 U.S.C. § 533(g).

Turner litigation.[219] Whatever the validity of that decision at the time, it cannot withstand scrutiny today. In light of developments since 1993, there is no support under the statutorily prescribed factors for a finding that home shopping broadcast stations serve the public interest and are therefore entitled to must-carry.[220] Indeed, the same facts that dem-

---

[219] *See, e.g., Home Shopping Order* at 5333 (Separate Statement of Chairman James H. Quello) ("I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must carry rules."); *id.* at 5340 (Separate Statement of Commissioner Ervin S. Duggan) ("My colleague Chairman Quello has fought the must-carry battle valiantly throughout his career at the Commission; I know that he cares deeply about it, and I share his concern that we not damage must-carry's ultimate defense. Nonetheless, I believe we could have reached a different outcome in this proceeding without harming the overall must-carry scheme. I regret that we have not done so.").

[220] Indeed, given Congress's concern about devoting spectrum to home shopping station licenses, as demonstrated by its directive that the Commission consider whether the spectrum was needed for other uses, a different result is all but assured. The demand for spectrum since the 1992 Cable Act has skyrocketed. Given the exponential growth since 1993 of spectrum-intensive services such as CMRS and advanced services, and the fact that Congress has attempted to wrest back from broadcasters all analog spectrum in order to meet numerous demands, including an urgent need for use of the spectrum by first responders and other public safety uses, there are clearly many, higher and better competing demands for the spectrum occupied by home shopping broadcast stations. *See, e.g.*, Ted Hearn, *McCain Pushes Earlier Analog Cutoff*, MULTICHANNEL NEWS, Oct. 18, 2005, *at* http://www.multichannel.com/article/CA6275465.html (reporting that Sen. John McCain recently expressed concern that spectrum be freed "quickly for use by

onstrate home shopping stations could not meet the statutory test for carriage also demonstrate that mandated carriage of those stations cannot pass constitutional muster.

Today, carriage of such stations — and particularly, unwatched home shopping/ infomercial stations like WRNN — fails to advance *any* of the purposes of must-carry. And any remote connection such carriage shares with one of the stated purposes cannot be described as furthering those purposes in a "direct and material" way. Thus, the burdens imposed by granting home shopping/infomercial stations with negligible over-the-air viewership must-carry rights would far outstrip the benefits attained thereby. As such, interpreting the must-carry rules to require carriage of such stations would contravene the requirement that a content-neutral government regulation of speech be "narrowly tailored" to promote the government interest served by the regulation and would thus be an unconstitutional burden on cable speech.[221]

---

first responders who require dependable crisis communications" and noting that "[m]aking that spectrum available was recommended by the 9/11 Commission").

[221] Significantly, in performing the second part of the *O'Brien* inquiry related to whether the must-carry rules do not "burden substantially more speech than is necessary to further" the government interest implicated by such rules, the Court stated "[b]ecause the burden imposed by must carry is congruent to the benefits it affords, we conclude must carry is narrowly tailored to preserve a multiplicity of broadcast stations *for the 40 percent of American households without cable*." *Turner II*, 520 U.S. at 215-16. Given the significant reduction in the percentage of American households without cable, the

B. Carriage of Home Shopping/Infomercial Stations With Negligible Over-the-Air Viewership Does Not Preserve Over-The-Air Television.

Allowing must-carry rights for home shopping/infomercial stations with negligible over-the-air viewership burdens far more speech than necessary to further the government's general interest (assuming such an interest still exists) in preserving over-the-air broadcasting. There was scant direct evidence in 1993, when 40% of the public relied solely upon over-the-air television broadcasting, that any significant portion of the public viewed over-the-air home shopping broadcasts.[222] It was primarily due to the lack of evidence to the contrary that the Commission determined that there was likely significant viewership.[223] Today, however, only a small portion of the public utilizes over-the-air broadcast television at all,[224] and there is no evidence that any significant — or even measurable —

---

benefits derived from must-carry have been concomitantly reduced. Under current conditions, therefore, logic requires that to survive constitutional scrutiny, must-carry must be tailored far more narrowly than it was under *Turner II*. As such, the Commission should not grant must-carry to digital-only home shopping stations.

[222] *Home Shopping Order* at 5322, ¶¶ 5-6 (discussing lack of ratings data and relying upon increased sales via infomercial as indicative of viewership). As discussed above, n.167, sales records are not good indicators of viewership.

[223] *Id.*

[224] *See* News Release, "*FCC Issues 12th Annual Report to Congress on Video Competition*" (rel. Feb. 10, 2006) (14% of households view television only over-the-air).

portion of those consumers tune in to broadcast home shopping channels. Indeed, as discussed *supra*, WRNN admitted to the Commission in 2004 that it had "no reportable over-the-air viewing" of its analog signal.

The case for carrying home shopping/infomercial stations to preserve their over-the-air viewership is even less persuasive in the case of a digital station like WRNN. It is highly unlikely that *even a single viewer* anywhere in the New York area views WRNN over-the-air. As noted above, over-the-air digital television households currently represent only about 0.1% of all television households, of which only about 9,500 households are likely located anywhere in the entire New York DMA, and of which only about 577 households are likely to be in the Communities; therefore, an insignificant number of households in the Communities even have the potential to receive WRNN's digital signal over-the-air. Under such circumstances, the consequence of granting the Petition would be to vastly increase in the number of viewers with access to WRNN and would have no connection with the purpose of "preservation"[225] that underlies the constitutional justification of must–carry. Granting the Petition will not in any way serve to "ensure that broadcast televi-

---

[225] *Turner I*, 512 U.S. at 623 and 652 ("In short, the must-carry provisions . . . are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation's broadcast television medium . . . and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable.").

sion remains available as a source of video programming for those without cable."[226] In particular, it will not provide any benefit to viewers without cable — "the immediate . . . beneficiaries of efforts to preserve broadcast television."[227] Virtually no non-cable viewers will get access to WRNN programming by virtue of grant of the Petition.

Even when WRNN's signal is imported to a cable system, it is not available to analog basic tier subscribers without downconversion from digital to analog. In such an instance, it is a perversion of Congress's intent in the 1992 Cable Act to require cable operators to provide a channel slot on the basic tier for a downconverted signal that is not practically available to over-the-air households, had no measurable over-the-air viewership when it was, and is not even viewable by analog basic cable subscribers without technical manipulation to make it so.

In particular, required carriage of such stations on the basic tier[228] results in an even greater burden to cable systems and far less of a fit between must-

---

[226] *Turner II*, 520 U.S. at 231.

[227] *Turner II*, 520 U.S. at 205.

[228] The Commission requires that pre-digital transition, cable systems downconvert digital must-carry signals to analog and carry them on the basic tier upon the station's request. *See WHDT-DT, Channel 59, Stuart Florida; Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights*, 16 FCC Rcd. 2692, 2769 ¶ 14 (2001); *Carriage of Digital Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd. 2598, 2643 ¶ 102 (2001).

carry's stated goals and means. Requiring Cablevision to carry WRNN on the basic tier would result in a vast expansion of the station's potential audience, since its signal currently has virtually no potential over-the-air audience.[229]

As a result of the foregoing, granting the Petition would significantly increase the burdens imposed by must-carry without in any way furthering the purposes served by such rules.

C. Carriage of Home Shopping/Infomercial Stations With Negligible Over-the-Air Viewership Does Not Increase Diversity On The Cable System.

Carriage of home shopping/infomercial stations, like WRNN, does not increase the diversity of voices on the cable system and in fact actually reduces the programming and services available to consumers by offering a duplicative service.

WRNN obtains much of its programming through arrangement with Jewelry TV, a national programming network already available on cable systems and other multichannel video programming services throughout the country. Mandated carriage of duplicative home shopping programming on a cable system undermines the very diversity interests that Congress sought to promote. Cable viewers already receive almost all of WRNN's content — and indeed, significantly more local news and locally-oriented

---

[229] As a result, if the Commission were to grant the Petition, it should not require carriage of WRNN in downconverted format on Cablevision's basic tier; carriage on a tier available to all basic tier customers with a digital box should suffice.

programming — from other broadcast stations and services carried on the Systems.

Moreover, forcing cable operators to dedicate channel space to unwatched, duplicative programming actually reduces diversity on the cable system. Carrying home shopping stations like WRNN — a station with admittedly no measurable broadcast audience and indeed no measurable viewership in the entire New York DMA — requires Cablevision to displace another programmer for which there is greater public demand or which otherwise enhances the value of the Cablevision offering. The burden on Cablevision's free speech rights by refusing it this freedom is substantial, since the number and variety of non-broadcast networks has expanded much more rapidly than has Cablevision's ability to add channel capacity to its systems.

Carriage of home shopping stations also reduces diversity in a manner not evaluated in *Turner* by precluding the cable operator from using the channel space to offer more innovative programming services such as new interactive services, or new products and services such as voice, high-speed Internet access, video on demand (VOD), or other advanced uses that increase the diversity of voices and offerings on the cable system. Such new services play an essential role in promoting competition in the communications industry and their continued expansion furthers a fundamental communications policy objective.[230] Yet such services utilize the same band-

---

[230] 47 U.S.C § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

width that would have to be dedicated to the carriage of unwatched home shopping/infomercial stations if must-carry is deemed to continue to require it. Consequently, such an interpretation of the must-carry rules will create inefficiencies in the market for important digital technologies and will hinder the ability of consumers to obtain highly desired services, such as high-speed Internet access and VoIP telephony.

D. Carriage of Home Shopping/Infomercial Stations With Negligible Over-the-Air Viewership Does Not Promote Competition.

The role that home shopping/infomercial stations played to provide competition to nonbroadcast services offering similar programming has plummeted since passage of the 1992 Cable Act. There can be no serious argument that broadcast home shopping/infomercial stations provide measurable competition to non-broadcast home shopping networks. Indeed, this is the very reason that WRNN leases a substantial portion of its programming day to Jewelry TV, and why it seeks to expand its coverage to position itself as a "regional" home shopping network.[231]

Indeed, the primary competitors to non-broadcast home shopping networks are Internet retailers, not

---

[231] Moreover, to the extent this interest continues to be valid, denial of the Petition would not harm its intent. Lack of WRNN's carriage here is not due to any anticompetitive action by the cable system, but due to a legitimate decision by the Commission limiting WRNN's must-carry rights to an area that accurately reflects its local market.

broadcast home shopping/infomercial stations. As viewership of over-the-air broadcast television has dwindled (and, in the case of WRNN, completely evaporated), retail sales over the Internet have exploded. According to comScore, Internet retail sales rose 24% just between 2004 and 2005, amounting to $81.6 billion dollars in 2005 — well more than *one billion dollars per week*.[232] The near-complete evaporation of over-the-air home shopping stations' ability to provide any competitive check whatsoever on non-broadcast home shopping networks, and the rise of Internet and catalog sales as the primary competitors to home shopping channels, demonstrate that mandated carriage of home shopping/infomercial stations does not materially advance the purposes of must-carry.[233]

This is not a situation where "the burden imposed by must-carry is congruent to the benefits it affords," as the Supreme Court found to be the case for must-carry in general in 1992. *Turner II*, 520 U.S. at 215. A grant of must-carry rights to WRNN in this circumstance would place serious burdens on Cablevision speech that do not directly further any of must-carry's stated purposes. Grant of the Peti-

---

[232] *See, e.g.*, www.internetretailer.com

[233] The growth of the Internet also protects against the Commission's concern that "home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner." *Home Shopping Order* at 5327, ¶ 28. Given the extraordinary variety of goods available over the Internet and the ease of the purchasing process, it is doubtful that home shopping stations continue to perform this function meaningfully today.

tion would therefore be an unconstitutional application of the must-carry provision of the 1992 Cable Act under the test established in *Turner I* and *Turner II*.

IV. GRANT OF WRNN'S PETITION WOULD EFFECT AN UNCONSTITUTIONAL TAKING OF CABLEVISION'S PROPERTY

It is well understood that channel capacity is the essence of the cable operator's property. Approval of WRNN's Petition to require Cablevision to provide a non-local broadcaster with permanent channel space would effect a *per se* regulatory and physical taking of this property in violation of the Fifth Amendment.[234]

As noted constitutional scholar Laurence Tribe has explained:

> Must carry rules do not simply regulate the manner in which cable operators use their systems. Rather, they effectively condemn a portion of cable operators' property and *turn it over to third parties* who are entitled to exclusive use of the channels in question on a continuing basis. This system is effectively the exercise of eminent domain power over a portion of the cable system. The power to exclude others from one's property is a traditional property right. . .[235]

---

[234] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (Finding that the government's partial taking and occupation of a rooftop in order to provide tenants cable access constituted a *per se* taking).

[235] Laurence H. Tribe, *Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obliga-*

A decision in favor of WRNN would deprive Cablevision of "economically beneficial us[e]" of its property, a *per se* taking.[236] Forcing Cablevision to satisfy must-carry obligations for non-local broadcast stations deprives it of "economically beneficial use" of its channel space, particularly given WRNN's lack of viewership. This is the case even if that taking is "partial" or "minor."[237] Moreover, because a finding that the Systems are properly in WRNN's market could be used in support of additional market modification petitions from other distant broadcasters, the approval of WRNN's petition would, in effect, open the door to significant additional must-carry obligations. As Professor Tribe concluded, "[g]iving broadcasters exclusive use of multiple cable channels on a continuing basis is at least as clearly a taking as is granting cable operators the more visible but far less economically viable right to attach their wires to a small corner of a

---

tion, submitted in CS Docket No. 98-120 (July 9, 2002) at 12-13 (citing *Loretto*, 458 U.S. at 435; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

[236] *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1019 (1992) (an owner that "sacrifice[s] all economically beneficial uses in the name of the common good... has suffered a taking."); *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081 (2005) (whether the taking "substantially advances" the government's interest is not an appropriate inquiry for a Fifth Amendment takings claim).

[236] *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1019 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 824, 834 (1987). *See also* Tribe, *supra* note 229, at 13.

[237] *Penn. Central Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

building's roof or requiring local exchange carriers to permit physical co-location on their premises."[238]

Cablevision has invested millions of dollars in its network to provide quality cable and other advanced services to its subscribers. These investments have significantly helped Congress's and the Commission's efforts to promote broadband — indeed, Cablevision is consistently recognized as a leader in digital subscriber penetration. Forcing Cablevision to turn over any part of that investment for use by a broadcaster located in Kingston, N.Y., 150 miles from the Communities, is a clear violation of the Takings Clause.[239]

* * *

---

[238] Tribe, *supra* note 229, at 13-14 (comparing must-carry to *Loretto* and *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1996), two cases in which the court found a regulatory taking).

[239] *See* Tribe, *supra* note 229, at 15 ("The constitutional principle is the same whether the transfer is accomplished wholesale or piece by piece.").

APPENDIX B

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-5553-ag

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR PETITIONER (Final Version)

* * *

February 8, 2008

* * *

III. THE FCC ERRED BY COMPELLING CARRIAGE IN VIOLATION OF CABLEVISION'S CONSTITUTIONAL RIGHTS.

A. Compelled Carriage of WRNN on Long Island Cannot Withstand a First Amendment Challenge.

In the *Turner* litigation, the Supreme Court upheld the must-carry statute against a facial challenge.[135] A facial challenge is "the most difficult challenge to mount successfully, since the chal-

---

[135] *See Turner I*, 512 U.S. at 671, 673.

lenger must establish that no set of circumstances exists under which the Act would be valid."[136] The *Turner* Court therefore did not, and could not, hold that must-carry obligations would be constitutional in all circumstances. Thus, nothing in *Turner* bars this Court from holding that compelled carriage of WRNN on Long Island violates the First Amendment on an as-applied basis.[137]

Congress enacted the must-carry statute based on a specific rationale: that cable operators should be prevented from harming the existing system of localism by depriving broadcasters of their audience.[138] That was also the theory on which the Supreme Court upheld the statute against facial attack: by the narrowest of margins, the Court held that the rationale was not content-based and therefore did not trigger strict scrutiny, and that the rationale was sufficiently weighty to justify the statute under intermediate scrutiny. As shown below, the reasoning on which the Supreme Court relied in the *Turner* cases cannot justify carriage here.[139]

First, and most fundamentally, unlike the *Turner* rationale, which granted carriage without examin-

---

[136] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[137] *See Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 184 (2d Cir. 2006) ("a finding of facial constitutionality does not foreclose 'as-applied' challenges.").

[138] *See supra*, pp. 9-10.

[139] No alternative rationale to justify carriage in this case has ever been suggested. Given that must-carry even when justified under the *Turner* rationale survived by only the narrowest margin, it is not plausible that any alternative rationale could support carriage here.

ing a station's programming content, the order under review is quite explicit in saying that WRNN is granted carriage rights because of the supposedly Long Island-targeted nature of its programming.[140] As such, the order rests on a rationale that is openly content-based, thereby triggering strict scrutiny.[141] In the *Turner* litigation, the Supreme Court sidestepped the question whether the consideration of programming content in the context of market-modification proceedings subjected the entire statute to strict scrutiny, finding that the parties had not raised that question.[142] Strict scrutiny cannot be side-stepped here. And no credible argument can be made that the order under review can withstand strict scrutiny: plainly, it is not narrowly tailored to a compelling interest.

Second, even if only intermediate scrutiny applied, the *Turner* rationale would not work on the facts presented. The *Turner* rationale contemplated the protection of noncable households from "loss of regular television broadcasting service due to competition from cable systems."[143] Thus, the Supreme Court approved a measure that guaranteed broadcasters the audience they would have had in a world

---

[140] *See 2007 Order* ¶ 4.

[141] *See Turner I*, 512 U.S. at 642.

[142] *See id.* at 643 n.6 ("the District Court did not address this provision"); *id.* at 676-77 (O'Connor, J., dissenting) (arguing that Section 614(h)(1)(C)(ii)'s concern with "localism" indicates that the statute's "preference for broadcasters over cable programmers is justified with reference to content").

[143] *See Turner I*, 512 U.S. at 663.

without cable — not a measure granting them access to a new and expanded audience.

If Congress had enacted a broader measure (requiring cable systems to carry, say, broadcast stations from all over the country), the Supreme Court could not have approved it. To be sure, the broader measure would have helped preserve broadcasting: it would have given broadcasters access to a larger audience. But the measure would also have constituted a naked preference for one kind of speaker (broadcasters) over others (cable operators and cable programmers). Such a preference would have triggered strict scrutiny under the settled principle that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[144]

That principle did not doom the must-carry statute as enacted only because the Supreme Court concluded that Congress had sought to accomplish a goal that was not "concerned with the communicative impact of the regulated speech"[145] — namely to protect broadcasters from cable-inflicted peril.[146] That theory is unavailable insofar as carriage is compelled outside of a station's natural market (*i.e.*, the market it would have in a world without cable). Thus, any measure that grants carriage to a station outside of its natural market triggers strict scrutiny.

Third, the *Turner* rationale contemplated the preservation of broadcast signals for the benefit of

---

[144] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[145] *Turner I*, 512 U.S. at 658.

[146] *Id.* at 659.

over-the-air viewers.[147] But, even when WRNN was still broadcasting in analog format, WRNN lacked any over-the-air audience — not only on Long Island, but even in Kingston.[148] Since then, WRNN has apparently sold off its analog over-the-air spectrum. There are virtually no consumers that have off-air antennas and digital equipment necessary to receive digital signals.[149] At best, then, WRNN's over-the-air audience is *de minimis*.

Granting preferential cable-carriage rights to WRNN therefore cannot be grounded in the *Turner* rationale. If WRNN has no over-the-air viewers, seeking to protect them cannot be a governmental objective that qualifies as rational, let alone as important. As the D.C. Circuit put it in connection with a station that likewise lacked an over-the-air audience: "[T]he rule is completely adrift from its economic rationale. The affected cable system could

---

[147] *See, e.g., id.* at 663 ("protecting noncable households from loss of regular television broadcasting service due to competition from cable systems is an important federal interest") (internal quotation marks omitted).

[148] *See WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004) ("WRNN-TV Limited acknowledges that early return of its NTSC channel will result in loss of an over-the-air analog service, but contends that the impact on the public will be imperceptive since, according to Nielsen Media Research, there was no reportable over-the-air viewing for the station for the month of April 2004.").

[149] *See, e.g., Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, MB Docket No. 04-210, 2005 WL 473322, at *1 n.4 (MB rel. Feb. 28, 2005).

not possibly have been injuring the benefitted broadcaster by fragmenting its audience."[150]

Fourth, the *Turner* rationale vitally depended on the notion that cable operators were able to deny broadcasters carriage for anticompetitive reasons — supposedly because cable operators were unconstrained by competition.[151] The apparent thinking was that, at the time, cable operators could drop even popular broadcast signals without having to worry about subscriber losses: because there was no competition, consumers had no other place to go.

---

[150] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1461 n.54 (D.C. Cir. 1985).

[151] *See Turner I*, 512 U.S. at 649 ("Congress designed the must-carry provisions . . . to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming"); *id.* at 661 ("The must-carry provisions . . . are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."); *id.* at 669-70 (Stevens, J, concurring in part and concurring in the judgment) ("The must-carry provisions are amply justified by special characteristics of the cable medium, namely, the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television. Cable operators' control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media.") (internal quotation marks and brackets omitted); *Turner II*, 520 U.S. at 197 ("cable operators possess a local monopoly over cable households"); *id.* at 227 (Breyer, J., concurring in part) ("a cable system . . . at present (perhaps less in the future) typically faces little competition").

Real-world market conditions on Long Island today could not be more different.[152] There are two providers of Direct Broadcast Service (DBS), DirecTV and Dish Network, which provide a multichannel package that is similar to the package provided by cable operators like Cablevision. In just over a decade, DBS's market share has grown from zero to about 30%.[153] In addition, telephone companies have begun providing multichannel video service,[154] including, as the order under review itself observes, on Long Island.[155] Verizon is investing bil-

---

[152] *See* Opp. at 54 (A 325); *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, News Release, at 3 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

[153] *See FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, News Release, at 3 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf ("DBS subscribers comprise the second largest group of MVPD households, representing 29 percent of total MVPD subscribers as of June 2006.").

[154] *See* Verizon Communications Inc., Press Release, *Verizon Reports Continued Success in 3Q 2007*, Oct. 29, 2007, *available at* http://investor.verizon.com/news/view.aspx?NewsID=863 (reporting that, as of the end of the third quarter of 2007, Verizon had approximately 717,000 subscribers to its FiOS TV service (an increase of approximately 600,000 over the past 12 months), and its fiber-to-the-home FiOS network passed 8.5 million premises).

[155] *See 2007 Order* ¶ 4 n.15 ("Verizon carries WRNN-DT on its systems in Massapequa Park, Oyster Bay and Hempstead, New York.").

lions of dollars in its video service,[156] and analysts have observed that, of all cable operators, Cablevision is most squarely caught in Verizon's crosshairs.[157] In sum, Long Island in 2008 shows a competitive landscape that was unimaginable at the time of *Turner*. It is therefore not plausible to suppose that Cablevision could profitably act on anticompetitive incentives.[158]

Fifth, there is no evidence whatsoever that Cablevision has declined to carry WRNN with a view to stifling competition.[159] Cablevision declines to carry the home-shopping station because it has no audience: people are not interested in watching it. By any measure, Cablevision can make better use of the cable spectrum that would be required to carry WRNN. It is worth noting that, when Congress en-

---

[156] *See, e.g.*, Verizon Communications, Inc., News Release, *Verizon Provides New Financial and Operational Details on Its Fiber Network as Deployment Gains Momentum*, Sept. 27, 2006, available at http://newscenter.verizon.com/press-releases/verizon/2006/verizon-provides-new.html (reporting that Verizon "expects to invest $18.0 billion in net capital from 2004 through 2010 in deploying [FiOS]").

[157] *See, e.g.*, Peter Grant & Dionne Searcey, *Verizon's FiOS Challenges Cable's Clout*, Wall St. J., Oct. 24, 2007, A12 ("Cablevision clearly is in the front lines of the FiOS battle. Already 25% of the homes it serves are exposed to FiOS service compared with about 4% for Comcast and Time Warner Cable Inc.").

[158] *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) ("in [justifying another set of rules based on the assumption that cable operators had market power] the Commission will have to take account of the impact of DBS on that market power").

[159] *See* Opp. at 62 n.231 (A 333).

acted the must-carry statute, it specifically carved out home-shopping stations, leaving it to the FCC to decide whether those stations should have must-carry rights — or, indeed, broadcast licenses at all.[160] Although the FCC in 1993 ruled that home-shopping stations should have must-carry rights, it recently initiated a proceeding to reconsider that conclusion.[161]

Finally, the *Turner* rationale posited that "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."[162] The record is entirely devoid of any evidence that, without carriage on Long Island, this fate will befall WRNN. To the contrary, WRNN has been on the air for more than 22 years and has prospered even without carriage on Long Island — so much so that it was able to fund expensive changes to its signal and programming without any guarantee of broader carriage. To defend must-carry against a facial challenge, it may have been enough for the FCC to show that, without must-carry, financial hardship would have been suffered by many television stations.[163] In the face of an as-applied challenge, more

---

[160] 47 U.S.C. § 534(g)(1).

[161] *Commission Seeks To Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations*, Public Notice, 22 FCC Rcd 8550 (2007).

[162] *Turner I*, 512 U.S. at 666 (plurality).

[163] *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting) ("If Congress wants to protect those stations that are in danger of going out of business, or bar cable operators from preferring programmers in which the operators have an ownership stake, it may do that. But it may not, in the course of

is needed: there must be a showing that financial hardship will befall the particular station seeking carriage rights.[164]

B. Compelled Carriage of WRNN on Long Island Cannot Withstand a Fifth Amendment Challenge.

In its order, the Commission rejected Cablevision's "per se" takings claim on the theory that must-carry "effectuates no permanent physical occupation of a cable operator's property, such as installation of the physical equipment at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*"[165] Rather, the Commission said, "a programming stream is transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light while the cable operator retains com-

---

advancing these interests, restrict cable operators and programmers in circumstances where neither of these interests is threatened.").

[164] As explained in the text, compelled carriage of WRNN on Long Island violates Cablevision's First Amendment rights regardless of whether, if a facial challenge were brought today, the Supreme Court would reach the same conclusion as it did in the *Turner* litigation. Given the dramatic changes in circumstances that have occurred in the wake of the *Turner* litigation, however, it is not plausible that the Supreme Court would reach the same conclusion again. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist").

[165] *2007 Order* ¶ 8 (footnotes omitted).

plete control over its physical property (*e.g.*, headend equipment)."[166]

But compelled carriage of WRNN involves the electronic equivalent of a beach-front lot: a 6 MHz channel on an analog cable tier. There is no reason to treat valuable electronic property differently than other property.[167] If the order under review stands, WRNN will be entitled to occupy Cablevision's Channel 48 entirely, denying Cablevision any and all rights to the channel's possession and use. When WRNN occupies Channel 48, a taking occurs, and compensation will fall due.

C. Constitutional Concerns Can and Must Be Avoided.

Although compelled carriage of WRNN on Long Island violates the Constitution, this Court need not so hold. It is well established that any "statute must be construed, if fairly possible, so as to avoid

---

[166] *Id.* (footnotes omitted).

[167] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) ("a requirement that facilities be built and dedicated without compensation . . . would be a deprivation forbidden by the Fifth Amendment"), *aff'd*, 440 U.S. 689 (1979); *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television."), *vacated on other grounds*, 512 U.S. 622 (1994); *see also United States v. Morris*, 928 F.2d 504, 511 (2d Cir. 1991) (characterizing computer "hacking" as a form of trespass).

not only the conclusion that it is unconstitutional but also grave doubts upon that score."[168] It is further well established that, where an agency's reading would generate significant constitutional doubt, that reading is not entitled to *Chevron* deference.[169] Thus, the Court can and should avoid constitutional questions: it should hold that, by interpreting the statute to permit it to compel carriage of WRNN on Long Island, the FCC misread the statute, for the reasons set forth above in Parts I and II.

* * *

---

[168] *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (internal quotation marks omitted); *see also United States v. Gonzalez*, 420 F.3d 111, 124 (2d Cir. 2005).

[169] *See, e.g., Clearing House Assoc. v. Cuomo*, 510 F.3d 105, 113 (2d Cir. 2007) ("'[W]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.' That broader principle is rooted in the doctrine of constitutional avoidance, which the Supreme Court has recognized may, in some instances, trump the deference typically afforded to an agency's interpretation of the statute it administers."); *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007) ("Courts interpret statutes to avoid constitutional infirmities . . . . We therefore reject the government's request for deference.").

APPENDIX C

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-5553-ag

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

REPLY BRIEF (Final Version)

* * *

March 3, 2008

* * *

III. THE FCC ERRED BY COMPELLING CARRIAGE IN VIOLATION OF CABLEVISION'S CONSTITUTIONAL RIGHTS.

In our opening brief, we showed that the order under review raised significant constitutional doubts, which must be avoided by reading the statute as suggested above. The FCC argues (at 55 n.20) that there are no constitutional doubts because each of Cablevision's constitutional arguments is "insubstantial." As shown below, that is plainly not the case.

A. In our opening brief, we showed (at 52) that the order under review triggers strict First Amend-

ment scrutiny because it requires carriage of WRNN on the basis of WRNN's Long Island-targeted content. In response, the FCC argues (at 47) that we failed to utter the words "strict scrutiny" before the FCC, and that the argument therefore is not properly preserved. But, before the FCC, Cablevision presented the claim that compelled carriage violates the First Amendment, and strict scrutiny is an intrinsic component of that properly preserved claim.[21]

---

[21] *See, e.g., Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005) (although "a petitioner must have raised an issue below to present it on appeal," the Court has "never held that a petitioner is limited to the exact contours of his argument below"); *id.* at 86-87 (petitioners are free to raise "specific, subsidiary legal arguments, or arguments by extension, that were not made below. . . . particularly one that is purely legal and falls outside the [agency's] traditional area of expertise"); *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1007-08 (D.C. Cir. 1996) ("appellate counsel will often present the same basic argument in a more polished and imaginative form than the Commission saw, but that, unfortunate as it may be for the Commission (and fortunate for us) is not the same thing as presenting a new argument on appeal."); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims.

On the merits, the FCC responds (at 47) by saying that strict scrutiny is triggered only if "the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." But it is settled that strict scrutiny is triggered even when the government merely regulates the subject matter that may be discussed, regardless of viewpoint.[22] The FCC also says (at 48) that "WRNN's programming was only one of a number of factors upon which the Commission relied in ordering carriage." But it is settled that, when government acts on a mixed motive, strict scrutiny is triggered so long as part of its motivation relates to content.[23]

They are, rather, separate arguments in support of a single claim — that the ordinance effects an unconstitutional taking.").

[22] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.").

[23] *See, e.g., Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (even though municipality claimed that it "ended [a] protest only because it created a safety hazard, not because the officers disagreed with the message," if the evidence shows that "the restriction of [plaintiff's] speech was content-based, the city must prove that prohibiting [plaintiff] from protesting on pedestrian walkways above the [freeway] is narrowly tailored and necessary to serve a compelling state interest"); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1250, 1252 (11th Cir. 2004) (where ordinance required permit for demonstrations in "expression of support for, or protest of, any person, issue, political or other cause or action," it did not matter that ordinance was also justified by "goals [of] maintaining public safety, avoiding traffic congestion, keeping the

In our opening brief, we also showed (at 53-54) that the *Turner* Court upheld only a statute that had been justified as restoring broadcast stations to the audience that they would have without cable. That theory can justify compelled carriage only insofar as a cable system's subscribers composed the station's traditional audience. It cannot justify carriage of a station that has expanded its over-the-air signal in pursuit of valuable cable-carriage rights. When broadcasters venture outside of their traditional market and fail to obtain carriage, they have not been injured by cable operators — they have injured themselves.

The FCC responds (at 48-49) by saying that this argument was not preserved. In fact, Cablevision made this precise argument before the FCC.[24] The FCC seeks to hang Cablevision on an assertion in our opening brief (at 54) that, if the government in *Turner* had defended must-carry without any link to cable's ability to siphon away a station's traditional audience, must-carry would have triggered strict scrutiny. But the FCC thereby misapprehends our argument — it is simply that compelled carriage of WRNN on Long Island cannot be justified under the

---

peace, and providing advance notice to law enforcement officials of public events").

[24] *See, e.g.*, Opp. at 53 (A-324) ("Must-carry was implemented to help restore broadcast stations in a cable-dominated world to the position they were in before cable became the 'dominant nationwide video medium.' . . . In other words, must-carry was intended to '*preserve* the *existing structure* of the Nation's broadcast television medium.") (internal quotation marks omitted); Opp. at 59 (A-330) (to similar effect); Opp. at 60 (A-331) (same).

rationale that the Supreme Court embraced in *Turner*. We added the "strict scrutiny" point only to explain *why* the government in *Turner* was compelled to rely on a justification limited in this way.

On the merits, the FCC argues (at 49) that "the statutory presumption in favor of DMA-wide carriage, combined with the station's strong signal coverage, the addition of local programming, and competitive carriage, means that WRNN's 'natural market' now extends to Cablevision's Long Island communities." By that statement, the FCC apparently means to suggest that the *Turner* rationale works just as well for a station in its traditional market as it does in a distant community that it targets with a signal and programming solely in search of must-carry rights. But, as shown above, it is unlikely that WRNN would have targeted Long Island if it were not for cable and must-carry. Thus, in a world without cable, WRNN would not be available off-air, and Long Island would not be included in WRNN's market.

In our opening brief, we also pointed (at 54-55) to the part of the *Turner* rationale positing that broadcast signals should be preserved for over-the-air viewers. Because WRNN has no over-the-air viewers, we argued, preserving the availability of WRNN for over-the-air viewers is not a sufficiently weighty interest to justify the curtailment of Cablevision's speech. In response, the FCC argues (at 49) that the *Turner* rationale does "not depend on a particular station's day-to-day audience share." But it seems self-evident that, if WRNN has zero over-the-air viewers, any governmental interest in benefiting those non-existing viewers could not qualify as "im-

portant." Would 1000 over-the-air viewers suffice? One hundred? Ten? One? Surely, there comes a point where the number is so small as to be the analytical equivalent of zero. Wherever the precise line may be drawn, it has been crossed here.

The FCC takes issue (at 50) with our premise, however, arguing that, as the February 17, 2009, digital transition approaches, more and more households will put themselves in a position to receive a digital signal off-air. Even assuming that prediction to be accurate, when WRNN relinquished its analog signal, it represented in an FCC filing that "the impact on the public will be imperceptible since, according to Nielsen Media Research, there was no reportable over-the-air viewing for the station . . . ."[25] In other words, even before the digital transition, WRNN itself insisted that its over-the-air viewership was either non-existent or *de minimis*. We do not understand the FCC to suggest that the digital transition would cause WRNN's over-the-air audience to grow.

In our opening brief, we demonstrated (at 55-58) that the *Turner* rationale vitally depended on the premise that cable operators are not subject to competition. We further showed that, since 1992, Cablevision has become subject to vibrant competition. The FCC casts doubt on the vibrancy of the video competition, pointing (at 51) to an FCC report indicating that, despite DBS competition, cable prices have increased. But rising prices do not signify

---

[25] *See WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004).

market power — they signify increased costs.[26] Cable rates have increased because the rates that programmers charge Cablevision for programming have exploded.[27]

The FCC also argues (at 51) that, "whatever the competitive promise of Verizon's entry into Cablevision's market, Verizon has only recently launched its FiOS video service on Long Island and then only in selected communities." The FCC does not explain why it matters that Verizon launched only recently, and one would think that recent entrants are particularly fierce competitors. Moreover, the FCC ignores that Verizon has announced that it will provide FiOS service in the remaining communities soon.[28] As summarized in Cablevision's recently filed Form 10-K, then, Cablevision "face[s] intense competition from . . . Verizon."[29]

---

[26] *See, e.g.*, Steven S. Wildman, *Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service*, at 3 (Sept. 10, 2003), *available at* http://www.ncta.com/DocumentBinary.aspx?id=266; Statement of Dr. Debra J. Aron ¶ 16, *available at* http://www.ncta.com/DocumentBinary.aspx?id=317.

[27] *See, e.g.*, United States General Accounting Office, *Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T, at 9 (Mar. 25, 2004), *available at* http://www.gao.gov/new.items/d04262t.pdf.

[28] *See* Verizon Communications Inc., News Release, *Verizon FiOS TV Customers Have a Powerful New Way to Find and Enjoy Home Entertainment*, July 17, 2007, *available at* http://newscenter.verizon.com/press-releases/verizon/2007/Verizon-FiOS-tv-customers.html ("The company expects 15 million households to be video-ready by 2010.").

[29] Cablevision Systems Corp., Form 10-K, Annual Report for the Fiscal Year Ended Dec. 31, 2007, at 12 (Feb. 28, 2008),

Finally, our opening brief showed (at 59-60) that the *Turner* rationale posited that, without carriage, broadcast stations would "either deteriorate to a substantial degree or fail altogether," and that there is no evidence that lack of carriage on Long Island will have that impact on WRNN. In response, the FCC argues (at 52-53) that the *Turner* rationale need not hold true in every case, so long as it holds true for broadcasters in the aggregate.

It is true that the Supreme Court in *Turner* asked only whether, without must-carry, "*significant numbers of broadcast stations* will be refused carriage on cable systems, and those broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."[30] But the *Turner* case involved a facial challenge. Thus, the FCC there needed to show only that must-carry could be constitutionally applied in some cases.

The instant case, by contrast, presents an as-applied challenge. Cablevision has a right to a determination whether its First Amendment rights are being infringed when it is compelled to carry a particular station (WRNN). That means that the FCC must show (at a minimum) that compelled carriage narrowly promotes an important governmental interest. Whether it can do so necessarily depends on whether it can show that, without carriage, deterioration or failure will befall the particular station at issue (WRNN). It cannot be relevant

---

available at http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=5500017&format=PDF.

[30] *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191-92 (1997) (emphasis added, internal quotation marks omitted).

whether, without carriage, deterioration or failure will befall some other station.

The FCC suggests, however, that there is an iron law of broadcast economics that, without carriage, a station will always "deteriorate to a substantial degree or fail altogether." In a case like this, involving a station seeking carriage in a community outside of its natural market (not a station excluded from communities within its traditional market), that runs counter to common sense. WRNN has been operational for more than 20 years and it has thrived without carriage on Long Island. Moreover, one can easily imagine a spoke station that is carried in its own spoke, that broadcasts just enough local programming to avoid license revocation, that broadcasts home-shopping programming the rest of the time, and that, as a result, reaps an extremely high return on investment. If such a station is denied carriage in another spoke, it will not "deteriorate" to any degree — it will only be hampered in reaping a return on investment that is even higher.

Whether the scenario in the prior paragraph accurately describes WRNN cannot be ascertained: WRNN is a closely held company that does not publish financial results. As we explained in our opening brief (at 59), however, there is every reason to believe that WRNN thrives. Neither the FCC nor WRNN have shown otherwise, and it was their burden to do so.[31] Accordingly, the record in this case

---

[31] *See, e.g., United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) ("the government bears the burden"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985) (describing "the burden the government must affirmatively bear to prove

allows only one conclusion: lack of carriage on Long Island will in no way affect WRNN's programming, just its owners' profits.

B. In our opening brief (at 60-61), we showed that must-carry requires cable operators to pump broadcasters' signal through their cable pipes. If a government agency required an oil pipeline to carry oil for unaffiliated companies, a physical occupation would unquestionably occur. The result should be no different when the occupation is not of a physical pipeline but of an electronic one. Cablevision transmits video signals in 6 MHz channels over its cable systems. The order under review completely appropriates the entirety of one such channel. The order denies Cablevision any compensation for the loss of this property.[32] Such an appropriation without compensation is an impermissible taking, even if the property in question is "electronic" in nature.

In response, the FCC relies on a single decision of the Court of Federal Claims, an Article I court whose decisions are appealable to the Court of Ap-

---

the substantiality of the interest served by the rules"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam) (FCC must compile "a record that convincingly shows a problem to exist"); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal quotation marks and citations omitted).

[32] *See* 47 U.S.C. § 534(b)(10).

peals for the Federal Circuit. In that decision, *Qwest Corp. v. United States*, 48 Fed. Cl. 672 (2001), the Court of Federal Claims rejected a claim by an incumbent telephone company that a taking had occurred when it was required to allow competitive telephone companies to transmit their communications through its wires. The court's holding on the point at issue here, however, is contained in just two sentences (at 694) that are devoid of any reasoning:

> While . . . the government-mandated co-location of one party's equipment on another party's premises constitutes a physical taking of the occupied space — because physical objects owned by one party have invaded and occupied physical space owned by the other — it is another question entirely whether the telecommunications traffic (*i.e.*, electrical impulses) of a competing carrier on the host carrier's equipment pursuant to a mandatory lease can be considered a "physical taking" of that equipment. There is no precedent for finding that the compulsory lease of [telephone wires] constitutes a "physical taking" of the subject equipment, and the court is not persuaded by plaintiff's "electron theory" that the telecommunications traffic [the competitor] generates on the [wires] it leases from Qwest constitutes a physical taking of [those wires].

In sum, there is no precedent from any court of appeals that supports the FCC's theory, and the single Court of Federal Claims decision on which the FCC relies is unreasoned. By endorsing the FCC's theory (that takings cannot be effected by an electronic occupation), then, this Court would break new ground. There simply is no reason why an elec-

tronic occupation should be treated differently from any other physical occupation.[33]

---

[33] *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("the insertion of local stations' programs into a cable operator's line up presumably is not a metaphysical act"), *vacated on other grounds*, 512 U.S. 622 (1994).